



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 20, 1996

Ms. Maria Elena Ramon  
Legal Services Division  
General Land Office  
1700 North Congress Avenue  
Austin, Texas 78701-1495

OR96-0211

Dear Ms. Ramon:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 38242.

The Texas General Land Office (the "GLO") received an open records request from a former GLO employee for certain records in connection with the employee's "dismissal appeal hearing." You inform us that the GLO has released to the requestor most of the requested records. You contend that certain other records are excepted from required public disclosure at this time pursuant to sections 552.101, 552.103, and 552.107(1) of the Government Code.

Because you contend that section 552.103 protects all of the records you submitted to this office, we will discuss it first. To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You contend that the requested information relates to reasonably anticipated litigation because the requestor "has also written to her Congressman, Steve Stockman, . . . who has forwarded her letter regarding her termination to the Equal Employment Opportunity Commission, Washington, D.C." This office has previously held in prior open records decisions that the pendency of a complaint before the EEOC indicates a substantial likelihood of litigation and is therefore sufficient to satisfy the requirements of section 552.103. See Open Records Decision No. 386 (1983) and authorities cited

therein. The logic of those decisions, however, does not apply here, where you have submitted to this office no evidence to suggest that the employee herself intends to file a complaint with the EEOC. Absent such a showing, we conclude that you have not met your burden of demonstrating the applicability of section 552.103.

You also contend that two memoranda contained in another GLO employee's personnel file is protected by section 552.102(a) of the Government Code. Section 552.102(a) is designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. See Open Records Decision No. 336 (1982). See also Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). We have marked the portions of the two memoranda that the GLO must withhold in order to protect the employee's privacy interests. The remaining portions of these memoranda must be released.

Finally, you seek to withhold certain handwritten notes that were "created by an attorney during an investigation" pursuant to the attorney-client privilege as incorporated into section 552.107(1) of the Government Code. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. Open Records Decision No. 574 (1990). You do not characterize the notes at issue as being either legal advice or a confidential communication, but you rather seek to withhold this information as attorney work product. Work product is considered to be an aspect of the "litigation exception," section 552.103 of the Local Government Code. In order to withhold information as work product, there must be a demonstration that the information relates to pending or reasonably anticipated litigation. Open Records Decision No. 575 (1990). Because you have made no such showing, the attorney's notes may not be withheld as work product.

We therefore conclude that the GLO must release the requested information in its entirety with the exception of the information we have marked as protected from disclosure under section 552.102. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Hamilton Guajardo  
Assistant Attorney General  
Open Records Division

Ref: ID# 38242

Enclosures: Submitted documents

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